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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DROTT MANUFACTURING CORPORATION,
Petitioner,

v.

DAN and PEGGY J. DAVIDSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Drott Manufacturing Corporation's right to a jury trial, established by the seventh amendment to the United States Constitution, was violated when the Ninth Circuit Court of Appeals took from the jury the issue of comparative negligence.

2. Whether the Ninth Circuit Court of Appeals' holding that some evidence of industry practice is conclusive on the issue of comparative negligence conflicts with *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38 (Alaska 1979), where the Alaska Supreme Court recognized that evidence of industry practice is not conclusive on the issue of negligence.

3. Whether the Ninth Circuit Court of Appeals failed to comply with the requirements of Fed. R. Civ. P. 51 and Fed. R. Civ. P. 61 when it reviewed jury instructions regarding causation.

PARTIES TO THE PROCEEDINGS

The Petitioner is Drott Manufacturing Corporation. The Respondents are Dan and Peggy Davidson.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	12
I. DROTT'S SEVENTH AMENDMENT RIGHT TO A JURY TRIAL ON THE ISSUE OF COMPARATIVE NEGLIGENCE WAS VIOLATED	12
II. THE NINTH CIRCUIT COURT OF APPEALS FAILED TO COMPLY WITH THE REQUIREMENTS OF FED. R. CIV. P. 61 AND FED. R. CIV. P. 51	16
A. FED. R. CIV. P. 61	16
B. FED. R. CIV. P. 51	20
CONCLUSION	26

TABLE OF AUTHORITIES

CASES — Page

Alloy International Co. v. Hoover-NSK Bearing Co., 635 F.2d 1222 (7th Cir. 1980) 16

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355 (1962) 12

Batesole v. Stratford, 505 F.2d 804 (6th Cir. 1974) 23

Brown v Avemco Inv. Corp., 603 F.2d 1367 (9th Cir. 1979) 21

Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976) 14

Clary Insurance Agency v. Doyle, 620 P.2d 194 (Alaska 1980) 21, 22

DeLand v. Old Republic Life Insurance Co., 758 F.2d 1331 (9th Cir. 1985) 23

Dura Corp. v Harned, 703 P.2d 396 (Alaska 1985) 17

Hageman v. Signal L. P. Gas, Inc., 486 F.2d 479 (6th Cir. 1973) 21

Jiffy Markets, Inc. v. Vogel, 340 F.2d 495 (8th Cir. 1965) 16

Kabatoff v. Safeco Insurance Co. of America, 627 F.2d 207 (9th Cir. 1980) 14

Lavender v. Kurn, 327 U.S. 645 (1946) 13

Love v. State, 457 P.2d 622 (Alaska 1969) 18, 19

Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917 (10th Cir. 1984) 16, 22, 24

Murphy v. Owens-Illinois, Inc., 779 F.2d 340 (6th Cir. 1985) 22, 23

Ollice v. Alyeska Pipeline Service Co., 659 P.2d 1182 (Alaska 1983) 21, 22

Pierce Packing Co. v. John Morrell & Co., 633 F.2d 1362 (9th Cir. 1980) 21, 24

Table of Authorities Continued

Page

Ramada Dev. Co. v. Rauch,, 644 F.2d 1097 (5th Cir. 1981) 24

Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144 (10th Cir. 1978) 13

Robinson v. Heilman, 563 F.2d 1304 (9th Cir. 1977) 21

Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959) 13

Shearson Hayden Stone, Inc. v. Leach, 583 F.2d 367 (7th Cir. 1978) 25

State v. Abbott, 498 P.2d 712 (Alaska 1972) 17

State v. Dutton, 83 Ariz. 193, 318 P.2d 667 (Ariz. 1957) 19

Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38 (Alaska 1979) 15

Tennant v. Peoria & Pekin Union Railway Co., 321 U.S. 29 (1947) 12, 13

Yukon Equipment, Inc. v. Gordon, 660 P.2d 428 (Alaska 1983) 17

CONSTITUTIONAL PROVISIONS:

seventh amendment to the United States Constitution 12

MISCELLANEOUS:

5A J. Moore, Moore's Federal Practice, ¶ 51.04 (2d ed. 1976) 21, 22

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Drott Manufacturing Corporation, a Division of J. I. Case ("Drott"), by and through its attorneys, Hughes, Thorsness, Gantz, Powell & Brundin, hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 1a-5a) is unpublished.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals

(App. 6a) was filed and entered on January 28, 1986. The decision of the Ninth Circuit Court of Appeals denying Drott's Petition for Rehearing (App. 7a) was filed on April 18, 1986. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The seventh amendment to the Constitution of the United States of America is set forth in the Appendix to this petition at 35a.

STATEMENT

This is a products liability case. It was tried under a theory of strict liability on allegations of design defect. Mr. Dan Davidson, an operating engineer, was injured on August 6, 1979, at Adak, Alaska. Mr. Davidson was standing and working underneath the boom and blocks of a Drott 2500 Hydraulic Rough Terrain Crane. The operator of the crane two-blocked the crane, breaking the auxiliary whip line cable. Two-blocking occurs when the operator allows the travelling block or headache ball to pull tight against the crane boom head. If the tension on the whip line is great enough, the line can break, allowing the block or headache ball to fall. In the present case, the standard auxiliary line headache ball had been replaced with a large piece of anchor chain, which was in place at the time of the accident. The anchor chain fell and struck Mr. Davidson. Mr. Davidson's wife, Peggy J. Davidson, joined the action as co-plaintiff seeking damages for loss of consortium.

The case was tried before the Honorable Robert C. Belloni, sitting by assignment, and a jury in the United States District Court for the District of Alaska in September and October of 1984. The plaintiffs' case was tried solely on the theory of design defect under Alaska law on strict products liability. Plaintiffs alleged that the failure to incorporate an anti-two-block safety device into the design of the crane rendered the crane defective at the time it left the hands of the manufacturer.

Drott Manufacturing Corporation defended the merits of the case on a number of grounds. Drott denied that the crane was defective in design. Drott presented evidence that the crane was not defective at the time it left the hands of the manufacturer. Drott presented evidence that proposed anti-two blocking devices were not workable and reliable items. In addition, Drott raised affirmative defenses, including the defense of comparative negligence on the part of Mr. Davidson for negligently being under the anchor chain while the crane was being set up to do its job.

Drott presented specific evidence on the issue of Mr. Davidson's negligence. First was the testimony of Ole Rohrbaugh. Mr. Rohrbaugh was employed with ACI, Davidson's employer, as a pile driver and a rigger. (App. 8a). On cross-examination, the following testimony was elicited from Mr. Rohrbaugh:

> Q Sir, I'd like to refer you, please, to page 50 of your deposition, regarding a general discussion about standing underneath the hook and the load. I'd like to put to you the question, and I'd like for you to read to the jury your answer that you gave at the time of the deposition.

* * *

"Question: Let me clarify the situation. I'm talking about if you're preparing the sling, and are lowering the hooks to hook up", and what was your answer?

A "You don't get under it, no."

"Question: And that is a fact of common safety?"

A "Yes."

(App. 9a).

Harold Radtke, plaintiff's operating engineer crane expert, testified as follows:

Q In fact, it's a matter of pride among the operators, isn't it, not to two-block a crane?

A Well, it's awfully embarassing, for one thing.

Q And it's a matter of concern to the people down on the ground working around the crane, isn't it?

A Definitely.

(App. 14a). The testimony of Mr. Rohrbaugh and Mr. Radtke reveal that, as a matter of industry practice relating to safety, construction workers on the ground do not stand beneath the hook of a crane when preparing the sling for a load.

Significantly, the very crane involved in Davidson's accident had been two-blocked several days before his accident. The operator testified, "I two-blocked the whip line, which is the light load line, I two-blocked

that with the boom, and the ball came off the line and fell into the ocean." (App. 15a). Further, at the job in which Mr. Davidson was working, at Adak, Alaska, there was a safety meeting once every week. (App. 10a). The minutes of the safety meeting were received in evidence as Exhibit "11." (App. 12a). Mr. Rohrbaugh testified that the second page of Exhibit "11," which was dated 7-30-79, six days before Davidson's accident, included reference to safety while working around cranes:

> Q Sir, I'd like you to please refer to the second page of the safety meeting—first of all, what is the date reflected within that document?
>
> A 7-30-79.
>
> Q Was it the practice to discuss the items which appeared on the agenda?
>
> A Yes.
>
> * * *
>
> A "Make all men aware when pouring concrete and moving crane over the heads of men."
>
> Q That was actually discussed as a safety item just in the week prior to Mr. Davidson's accident, was it not?
>
> A Yes.

(App. 11a-12a).

Davidson's own testimony showed both his knowledge of two-blocking and the need to be safe around cranes:

Q Mr. Davidson, you have been a crane operator for the operating engineers?

A Yes.

Q And you've operated hydraulic cranes, haven't you?

A Yes, sir.

Q You're aware of the potential for two-blocking, aren't you?

A Yes, sir.

(App. 17a-18a).

Davidson recognized his own signature on the safety minutes, Exhibit "11." (App. 19a). He was present at the meeting where booming cranes over the heads of men was discussed. (App. 19a-20a). Further questioning went as follows:

Q That was something that was discussed at that meeting, was it not?

A Correct.

(App. 21a).

On the morning of the accident, the plan was to move Davidson's concrete pump to another spot for repairs. There was no immediate rush to get the pump moved out of the way. (App. 21a). The crane had to travel to Davidson's pump:

Q You were aware when the crane came up and then stopped next to the pump?

A I saw the crane come up and stop.

Q And you were about six feet high off the ground at that time?

A I wouldn't swear I was six feet, five feet. It was up off the ground over five feet.

Q And does the operator in that crane sit up about the same level?

A I would say yes, he would be approximately the same level as me.

Q And so the boom is at that level or somewhat higher than that, isn't it?

A Yes, sir, um-hmm.

Q You were aware that the boom swung over towards the pump, weren't you?

A No, sir, I never saw the boom swing over to the pump.

Q That wasn't my question, sir, you were aware of it swinging over.

A Oh, I was aware of it, that he was eventually going to swing over and pick it up, yes, sir.

(App. 22a-23a).

The testimony in Davidson's deposition taken prior to trial then became relevant to the trial proceedings:

Q All right. I'm going to show you the—I'm just going to read my questions and your answers at the time of the deposition, starting at page 95, line—well, let's start at line 18 for a little background.

"Question: Were you actually all the way on top of the concrete pump the moment the crane stopped?

"Answer: Yes.

"Question: Did the boom of the crane move at any time after the crane came to a stop by the concrete pump?

"Answer: Yes."

"Question: Okay. Which direction did it move?

Your answer was: "He swung it to his left.

My question: "To his left, towards the concrete pump?

"Answer: Yes.

(App. 24a).

"Question: Okay, what did you think was in your own mind what—

Your Answer: "He was swinging over to pick it up.

"Question: Okay. And did you know that, even though you weren't actually looking?

"Answer: Yes."

(App. 25a-26a).

In summary, there was evidence that Davidson and the workers in general were aware of the potential hazards presented by two-blocking, and that two-blocking was "definitely" a concern to men on the ground. Further, Mr. Davidson was aware of the fact that the boom was swinging above his head moments before the anchor chain fell.

The jury was instructed on October 3, 1984. Plaintiff did not object to the court's instruction on causation.

The first question on the special verdict form asked: "Did the plaintiff, Dan Davidson, prove that the crane's design caused his injury." (App. 31a). The jury answered the interrogatory "No." (App. 31a). Consequently, no other questions were, or needed to be answered by the jury, including a later one on comparative negligence. Judgment was entered in favor of defendant. (App. 33a).

Plaintiffs brought an appeal of the judgment before the Ninth Circuit Court of Appeals. One issue on appeal was whether the district court had erred in denying plaintiffs' motion for a directed verdict on the issue of comparative negligence. By memorandum opinion, the Ninth Circuit Court of Appeals held that Drott was not entitled to present the comparative negligence issue to the jury. (App. 1a-5a). Further, in Footnote One of its opinion, the Ninth Circuit Court of Appeals recognized that "[a]ny error committed by the district court in this regard was harmless because the jury did not reach the issue of comparative negligence." (App. 3a). Since the issue of comparative negligence was never reached, the court's ruling could not be used to reverse the jury verdict. Therefore, the Ninth Circuit Court of Appeals ruled that the mere presence of the theory of comparative negligence somehow tainted the jury's consideration of defect and causation, thus requiring a new trial.

Mr. Davidson assigned as error the district court's jury instructions on causation. Specifically at issue was whether the first special verdict question concerned product defect or causation, and whether the jury had considered comparative negligence when it answered "No" to that question. The Ninth Circuit Court of Appeals recognized that, under Fed. R. Civ.

P. 51, it would ordinarily review a jury instruction only if there had been a "specific objection in the district court to the instruction given." (App. 2a-3a). However, the court chose to review the instructions, even though Davidson never objected in the district court. The Ninth Circuit Court of Appeals believed that the district court had *sua sponte* added comparative negligence language in the context of the causation instruction, thereby denying Mr. Davidson the opportunity to object.

A careful review of the record, however, reveals that the district court had not modified the causation instruction *sua sponte*. The matter of jury instructions in general had been a subject of continuing discussions between the district court and the parties at various times throughout the proceeding. On October 2, 1984, one full day before the jury was instructed, the district court discussed the first special verdict interrogatory with counsel for the Davidsons and counsel for Drott. At that time, the court said:

> Therefore, the following instruction should solve the problem and express the law as it currently is in Alaska.
>
> If the accident was caused solely because of the substitution of the chain for the ball, that is the same as to say that the design did not cause the accident and your answer to question number one would be no.
>
> The same would be true if the operator's negligence was the sole cause, or the plaintiff's own negligence was the sole cause.

> A different rule applies if the defective design was a part of the cause and one of those other events was also a part of the cause.

(App. 27a). The district court's statement on October 2, 1984, regarding the first interrogatory and comparative negligence was identical to the instruction that the district court gave to the jury on October 3, 1984. (App. 30a). However, Mr. Davidson failed to object at any time to the instruction.

On February 14, 1986, Drott petitioned the Ninth Circuit Court of Appeals for a rehearing. (App. 36a-49a). Drott argued that the Ninth Circuit Court of Appeals had erroneously believed that the causation instruction was given *sua sponte* by the trial court. Second, Drott argued that, without an objection to the instruction by the plaintiffs, the instruction would have to constitute plain error before the Ninth Circuit Court of Appeals could review it. Third, Drott argued that any error in the causation instruction was harmless. Finally, Drott argued that there was substantial evidence of comparative negligence. On April 18, 1986, the Ninth Circuit Court of Appeals denied Drott's Petition for Rehearing. (App. 7a).

Drott now petitions the Court for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals. In this petition, it is asserted that there was substantial evidence in support of the theory of comparative negligence. Therefore, that issue was properly submitted to the jury. The reversal by the Court of Appeals for the Ninth Circuit abridges Drott's constitutional right to a jury trial. However, even if a directed verdict on comparative negligence were upheld, the comparative negligence theory did not taint the jury's consideration of causation. The

instructions as a whole properly informed the jury on causation. Further, error in the instruction could not be assigned where plaintiff failed to object. Finally, the Ninth Circuit Court of Appeals ignored the Federal Rules of Civil Procedure in examining this issue. For these reasons, the ruling on appeal to the Ninth Circuit Court of Appeals must be reversed and the original judgment reinstated.

REASONS FOR GRANTING THE PETITION

I. DROTT'S SEVENTH AMENDMENT RIGHT TO A JURY TRIAL ON THE ISSUE OF COMPARATIVE NEGLIGENCE WAS VIOLATED.

The Ninth Circuit Court of Appeals' decision to take the question of comparative negligence from the jury denied Drott the right to a jury trial on that issue. Federal subject matter jurisdiction in this case was based on diversity of citizenship, 28 U.S.C. § 1332. "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 360 (1962).

The seventh amendment to the United States Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." (App. 35a). It is the seventh amendment "that fashions 'the federal policy favoring jury decisions of disputed fact questions.'" (Citations omitted). *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. at 360.

"It is the jury, not the court, which is the fact-finding body." *Tennant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35 (1943). The jury "weighs

the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable." (Citations omitted). 321 U.S. at 35.

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." 321 U.S. at 35; *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110 (1959). On appeal, the reviewing court must view the evidence in the light most favorable to the prevailing party. *Rasmussen Drilling v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144 (10th Cir. 1978), cert. denied, 439 U.S. 862 (1978).

> Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Lavender v. Kurn, 327 U.S. 645, 653 (1946).

The Ninth Circuit Court of Appeals erred in holding that sufficient evidence did not exist to require the

issue of Mr. Davidson's comparative negligence to go to the jury. Mr. Harold Radtke, an experienced crane operator who was called by plaintiffs, testified that two-blocking was a matter of concern to persons who work on the ground around cranes. (App. 14a). Mr. Ole Rohrbaugh, a co-worker of Mr. Davidson, testified that persons on the ground do not get under crane hooks when preparing loads for lifting, and when the hooks are being lowered. (App. 9a). Mr. Davidson himself was aware that two-blocking could occur with hydraulic cranes. (App. 17a-18a). Six days before the subject accident occurred, Mr. Davidson had attended a job safety meeting where the topic of booming cranes over workers' heads was discussed. (App. 19a-21a). Despite his knowledge of the danger presented by two-blocking, Mr. Davidson stood directly beneath the crane boom and was injured.

Further, the Ninth Circuit Court of Appeals erred in holding that evidence of industry practice is conclusive on the issue of comparative negligence. The court was required to apply Alaska substantive law in this diversity action. *Kabatoff v. Safeco Insurance Co. of America*, 627 F.2d 207, 209 (9th Cir. 1980). In Alaska, comparative negligence is a defense in products liability cases when plaintiff uses the product with knowledge of the defective condition. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976). The evidence on record at trial of this case amply supports Drott's position that Mr. Davidson knew of the potential dangers associated with two-blocking, and was negligent in working directly beneath the crane boom.

Under Alaska law, evidence of compliance with industry-wide standards is not conclusive on the issue

of negligence. *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 45 (Alaska 1979). However, in reversing the judgment below on the issue of comparative negligence, the Ninth Circuit Court of Appeals relied heavily on evidence which showed that "it is acceptable industry practice to work under an unloaded hook." (App. 2a). In effect, the Ninth Circuit Court of Appeals held that industry practice was conclusive on the issue of Davidson's comparative negligence, and that any evidence supporting the judgment against plaintiffs on that issue was irrelevant. The Ninth Circuit Court of Appeals' holding is directly contrary to the substantive rule of *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979).

Further, the Ninth Circuit Court of Appeals' opinion as to industry practice is contradicted by the testimony of Mr. Rohrbaugh and Mr. Radtke that, as a matter of industry practice relating to safety, construction workers do not stand beneath the hook of a crane when preparing a sling for a load. Indeed, there is no reason whatsoever for a worker to stand beneath the crane boom, except when attaching the hook to the sling. Mr. Davidson could have performed his job duties safely if he had merely stood aside while the crane operator positioned the boom and lowered the hook. The Ninth Circuit Court of Appeals failed to view the evidence in the light most favorable to Drott.

The Ninth Circuit Court of Appeals incorrectly reweighed the evidence presented at trial, and invaded the exclusive fact-finding province of the jury. In doing so, the court violated Drott's right to a jury trial on the issue of comparative negligence.

II. THE NINTH CIRCUIT COURT OF APPEALS FAILED TO COMPLY WITH THE REQUIREMENTS OF FED. R. CIV. P. 61 AND FED. R. CIV. P. 51.

A. FED. R. CIV. P. 61.

At no point did the Ninth Circuit Court of Appeals adequately consider the effect of Davidson's failure to object to the causation instruction. Further, any error in the causation instruction was harmless under Fed. R. Civ. P. 61.

The harmless error rule of Fed. R. Civ. P. 61 applies to jury instructions. *Jiffy Markets, Inc. v. Vogel*, 340 F.2d 495 (8th Cir. 1965). Fed. R. Civ. P. 61 provides that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Error is harmless if the jury was sufficiently informed. *Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1226 (7th Cir. 1980). To determine whether the jury was sufficiently informed, the court of appeals must analyze the jury instructions as a whole. *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 926 (10th Cir. 1984); *Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d at 1226.

In the present case, the Ninth Circuit Court of Appeals failed to review the jury instructions as a whole. Rather, the court narrowly considered only the first special verdict interrogatory. (App. 4a). When the causation instructions are considered as a whole, it becomes clear that the district court fully informed the jury of all of the elements of proximate cause under Alaska law.

In *Dura Corp. v. Harned*, 703 P.2d 396, 406 (Alaska 1985), the Alaska Supreme Court applied the negligence standard of proximate causation, and held that "[a] defendant's design defect will be the legal or proximate cause of the plaintiff's injury if the defective product was more likely than not a substantial factor in bringing about the plaintiff's injury." (Citation omitted). The Alaska Supreme Court had previously applied the substantial factor test in another case involving strict liability in tort, *Yukon Equipment, Inc. v. Gordon*, 660 P.2d 428, 433 (Alaska 1983) (cited in *Dura Corp. v. Harned*, 703 P.2d at 406). Further, in *State v. Abbott*, 498 P.2d 712, 727 (Alaska 1972), the court held that:

> Normally, in order to satisfy the substantial factor test it must be shown *both* that the accident would not have happened 'but for' the defendant's negligence and that the negligent act was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to it. (Footnote omitted).

In this case, the district court instructed the jury that:

> *A legal cause of damage is a cause which is more likely than not a substantial factor in bringing about plaintiff's injuries. A defect in a product is a substantial factor when it is shown both that the accident would not have happened but for the defect, and the defect was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to the defect.*

> This does not mean that the law recognizes only one legal cause of an injury or a damage, consisting of only one factor, or thing, or conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons may operate at the same time, either independently, or together to cause injury or damage, and in such a case, *each may be a legal cause.*
>
> Manufacturers are not absolute insurers of their products. The law will not impose legal responsibility simply because a product causes harm. If the accident was caused solely because of the substitution of the chain for the ball, that is the same as to say that the design did not cause the accident, and your answer to question number one would be no.
>
> The same would be true if the operator's negligence was the sole cause, or if the plaintiff's own negligence was the sole cause. A different rule applies if the defective design was a part of the cause, and one of these other events were also a part of the cause. *In that case, each would be a legal cause.* (Emphasis added).

(App. 30a). Clearly, considering the instructions as a whole, there was no reversible error. The district court's instructions correctly stated the substantial factor test for causation under Alaska law. The instructions were not incomplete or misleading.

A detailed discussion of the harmless error rule under Alaska law is found in the case of *Love v. State,* 457 P.2d 622 (Alaska 1969). Although the discussion

arises in the context of a criminal case, the reasoning is sound and is applicable to the present case. The *Love* court said that:

> The pivotal question is what the error might have meant to the jury. Our function is to consider not how the error would have affected us if we had tried the case, but how it may have affected a jury of reasonable laymen. It is the impact on their minds which is critical in determining whether an error impaired or affected the substantial interest of the defendant in having a fair trial.

457 P.2d at 630. The court's analysis further indicated what the reviewing court must itself do in weighing the issue of harmless error:

> '[H]ad the error pointed out not been committed is there reasonable probability that the verdict might have been different? In answering this question, the members of this court must necessarily put themselves, as nearly as possible, in the position of the jury in order to determine whether, as reasonable men, the error committed probably affected their verdict.'

457 P.2d at 631 n. 15, quoting *State v. Dutton*, 83 Ariz. 193, 318 P.2d 667, 671 (Ariz. 1957).

The Ninth Circuit Court of Appeals' own analysis shows that the jury could not have considered the issue of comparative negligence when it answered "No" to the subject causation interrogatory. The court held that any error committed by the district court in failing to grant a directed verdict in Davidson's favor on the issue of comparative negligence "was

harmless because the jury did not reach the issue of comparative negligence." (App. 3a). Further, the Ninth Circuit Court of Appeals said that "[t]here is no evidence in the record from which a reasonable juror could find that Davidson was [comparatively] negligent." (App. 2a). Assuming for purposes of argument that the court was correct, the issue of comparative negligence simply could not have affected the jury's determination of whether the crane was defective, or whether the alleged defect caused the accident. Accordingly, the Ninth Circuit Court of Appeals erred in holding that the causation instructions did not constitute harmless error.

B. FED. R. CIV. P. 51.

The Ninth Circuit Court of Appeals failed to comply with the requirements of Fed. R. Civ. P. 51 when it reviewed the jury instructions regarding causation. This permitted the court to erroneously hold that the causation instruction constituted reversible error.

Fed. R. Civ. P. 51 states the requirements for objections to jury instructions. Rule 51 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict,*

> *stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury. (Emphasis added).

Federal Courts have analyzed Rule 51 with Fed. R. Civ. P. 46. Appellant still must make an objection in some form at trial before he may urge as error on appeal the giving of an instruction. *Pierce Packing Co. v. John Morrell & Co.*, 633 F.2d 1362 (9th Cir. 1980); 5A J. Moore, Moore's Federal Practice, ¶ 51.04 (2d ed. 1976). Appellant must still state "distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51; *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 485 (6th Cir. 1973). The purpose of Rule 51 is to "prevent unnecessary new trials caused by errors in instructions that the district court *could have corrected if they had been brought to its attention at the proper time. . . .*" (Emphasis added). *Brown v. Avemco Investment Corp.*, 603 F.2d 1367, 1371 (9th Cir. 1979) (quoting *Robinson v. Heilman*, 563 F.2d 1304 (9th Cir. 1977)). In addition, a Rule 51 objection permits the court to reconsider its earlier decision, and perhaps correct that decision. *Clary Insurance Agency v. Doyle*, 620 P.2d 194 (Alaska 1980). The mere fact that the court is generally aware of plaintiff's position on an issue does not excuse the failure to object. *Ollice v. Alyeska Pipeline Service Co.*, 659 P.2d 1182 (Alaska 1983).

In the present case, "Davidson did not object in the district court to the [causation] instruction" that he assigned as error on appeal. (App. 3a). The Ninth Circuit Court of Appeals noted that, ordinarily, it would not review the district court's jury instructions

unless appellant had raised a specific objection to the instructions at trial. (App. 2a-3a). However, the court chose to review the causation interrogatory because (1) at the close of evidence, Davidson moved for a directed verdict on the issue of comparative negligence; (2) Davidson "objected to Drott's proposed jury instruction regarding comparative negligence;" and (3) the district court "sua sponte amplified on that instruction orally, and in doing so introduced the issue of Davidson's negligence." (App. 3a-4a). The court's belief that the instruction was given *sua sponte* was erroneous, as discussed below. More importantly, the Ninth Circuit Court of Appeals ignored Fed. R. Civ. P. 51. The exception to that rule, relied upon by the Ninth Circuit Court of Appeals, is "narrow" and only "rarely applied." *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340, 346 (6th Cir. 1985). The exception is triggered only where objection would have been a mere formality and where the error was "obvious and prejudicial." 779 F.2d at 346. Here, the exception does not apply.

The requirement for an objection is not a mere procedural technicality. *Clary Insurance Agency v. Doyle*, 620 P.2d 194 (Alaska 1980); *Ollice v. Alyeska Pipeline Service Co.*, 659 P.2d 1182 (Alaska 1983). The court must be adequately informed of the objecting party's position. *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 924 (10th Cir. 1984); 5A J. Moore, Moore's Federal Practice, ¶51.04 (2d ed. 1976). "Properly objecting, far from being a formality, 'would have fulfilled the basic purpose of Rule 51 by alerting the trial judge to a potential problem area, and would have aided him in his effort to clearly and correctly instruct the jury'." *Murphy v. Owens-Illi-*

nois, Inc., 779 F.2d at 346 (quoting *Batesole v. Stratford*, 505 F.2d 804, 810 (6th Cir. 1974)). In the present case, Davidson never objected to the form of the subject interrogatory. There is nothing in the record to show that the district court was put on notice of a structural flaw in the instruction. The confusion that the Ninth Circuit Court of Appeals noted could have been cured if Davidson had made such an objection. Therefore, Davidson invited the error in the causation instruction. *Accord DeLand v. Old Republic Life Insurance Co.*, 758 F.2d 1331 (9th Cir. 1985).

The Ninth Circuit Court of Appeals also apparently believed that Davidson was not afforded sufficient time in which to object to the causation instruction because "[t]he court sua sponte amplified on that instruction orally and in doing so introduced the issue of Davidson's negligence." (App. 4a). A careful review of the record, however, shows that the district court did not in fact modify the causation instruction *sua sponte*. On October 2, 1984, the district court discussed the identical causation question with counsel for Mr. Davidson and counsel for Drott. (App. 27a). At that time, the court stated verbatim the jury instruction that was eventually given on October 3, 1984, in which comparative negligence was discussed in the context of the first interrogatory. (App. 30a). However, Mr. Davidson failed to object on October 2, 1984 to the inclusion of comparative negligence language in the causation instruction. He again failed to object on October 3, 1984. Davidson was afforded more than sufficient time to object. His failure to do so precluded an appeal regarding the district court's causation instructions.

Further, it is by no means certain that the district court would have rejected out of hand an objection by Davidson. This is true since (1) the court had declined to instruct on Drott's requested instructions on superseding and intervening cause, and (2) even in the context of the directed verdict motion on comparative negligence, the court considered it to be a close question. (App. 27a-28a). However, the judge was never given the chance to consider the question. The alleged defect in the instruction which the Davidsons claim is error was not brought to the attention of the district court either on October 2, 1984 when it was discussed, or on October 3, 1984. Objection is required before the Ninth Circuit Court of Appeals may review the issue. Fed. R. Civ. P. 51.

As a final matter, the Ninth Circuit Court of Appeals did not determine whether there was plain error in the jury instructions as a whole before it reviewed those instructions and rendered its decision. Indeed, the Ninth Circuit Court of Appeals has in the past stated that it does not apply the plain error analysis in civil cases when appellant fails to present his objection before the district court. *Pierce Packing Co. v. John Morrell & Co.*, 633 F.2d 1362 (9th Cir. 1980).

The Ninth Circuit Court of Appeals' position on this issue directly conflicts with the decisions of numerous other federal courts. The Fifth Circuit Court of Appeals has held that Fed. R. Civ. P. 51 requires application of the plain error standard where appellant fails to object to the subject jury instruction at the trial level. *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1102 (5th Cir. 1981). Similarly, in *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 924

(10th Cir. 1984), the court held that it would "not review instructions given to which no objections were lodged before the jury retired for deliberation unless they are patently plainly erroneous and prejudicial."

In this regard, the Seventh Circuit Court of Appeals noted, in *Shearson Hayden Stone, Inc. v. Leach*, 583 F.2d 367, 370 (7th Cir. 1978) that "although this court has the power to reverse for plain error in an instruction to which no party specifically objected, this power is exercised only in very rare circumstances where necessary to prevent a miscarriage of justice." (Citations omitted).

In the case at bar, the causation instructions did not cause a miscarriage of justice. The Ninth Circuit Court of Appeals specifically held that "there is no evidence in the record from which a reasonable juror could find that Davidson was negligent." (App. 2a). Assuming that the Ninth Circuit Court of Appeals is correct, the jury could not have considered comparative negligence in deciding the issue of causation. Any error was therefore harmless. The Ninth Circuit Court of Appeals erred in failing to conduct a thorough "plain error" analysis.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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July, 1986

APPENDIX

TABLE OF CONTENTS

	Page
Appendix A (court of appeals' memorandum opinion, filed on January 28, 1986)	1a
Appendix B (court of appeals' judgment, filed and entered on January 28, 1986)	6a
Appendix C (court of appeals' order denying Appellee Drott Manufacturing Corporation's Petition for Rehearing)	7a
Appendix D (trial testimony of Ole Rohrbaugh, pages 2-135, 2-142, 2-143, 2-144, 2-145, 2-147)	8a
Appendix E (trial testimony of Harold Radtke, page 3-35)	14a
Appendix F (trial testimony of James Lassiter, pages 2-131, 2-132)	15a
Appendix G (trial testimony of Dan Davidson, pages 4-152, 4-153, 4-155, 4-156, 4-157, 4-160, 4-161, 4-162, 4-163, 4-164, 4-165	17a
Appendix H (trial transcript, pages 6-133, 6-141, 6-142, 7-9, 7-10, 7-11, 7-32)	27a
Appendix I (district court clerk's certificate of record, page 7)	33a
Appendix J (seventh amendment to the Constitution of the United States of America)	35a
Appendix K (Petition for Rehearing of Drott Manufacturing Corporation)	36a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3537
DC No. CV 81-399 RCB

DAN DAVIDSON and PEGGY DAVIDSON,
Plaintiffs-Appellants,

v.

DROTT MANUFACTURING CORPORATION,
Defendant-Appellee.

FILED
JAN 28 1986

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Honorable Robert C. Belloni, District Judge, Presiding
Argued and Submitted January 6, 1986
Seattle, Washington
Before: WRIGHT, CANBY and WIGGINS, Circuit Judges

Dan and Peggy Davidson (Davidson) appeal from a judgment following a jury verdict in favor of Drott Manufacturing Corporation (Drott) in their diversity action against Drott. Dan was injured when a cable on a crane manufactured by Drott broke, causing a chain to fall on him at a construction site where he was working.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Davidson assigns error to a jury instruction given by the district court. The challenged instruction was given concerning the first question on the verdict form: "Did the plaintiff, Dan Davidson, prove that the crane's design legally caused his injury?" The court instructed the jury that it should answer "no" to this question if, among other possibilities, it found that Davidson's own negligence was the sole cause of the accident.

In assessing jury instructions, we consider the charge as a whole to determine whether it is misleading or misstates the law to the prejudice of the objecting party. *Smiddy v Varney*, 665 F.2d 261, 265 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982). We do not reverse a district court's decision in a civil trial because of erroneous jury instructions if the instructions as given are more probably harmless than not. *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983).

This appeal presents two issues for our consideration. First, was it error for the district court to instruct the jury that it might find Davidson's negligence to be the sole cause of his injuries? Second, if the instruction was error, may we reverse based on that error?

Our review of the record indicates that it clearly was error for the district court to instruct the jury that Davidson's negligence might be the sole cause of his injuries. Davidson is correct in his contention that he was entitled to a directed verdict on that issue. There is no evidence in the record from which a reasonable juror could find that Davidson was negligent. All of the testimony indicates that it is acceptable industry practice to work under an unloaded hook. Indeed, it would be impractical for a rigger to perform his job in any way other than as Davidson was performing it at the time he was injured.

Having established that it was error to give this instruction, we must now determine whether we may reverse based on that error. We will ordinarily review a district

court's jury instructions only if there is a specific objection in the district court to the instruction as given. Fed. R. Civ. P. 51; *see Pierce Packing Co. v. John Morrell & Co.*, 633 F.2d 1362, 1365 (9th Cir. 1980). However, we will review an instruction that was not objected to if the trial court was aware of the party's position and if it is obvious that an objection would have been useless. *Brown v. Avemco Investment Corp.*, 603 F.2d 1367, 1370 (9th Cir. 1979).

Davidson did not object in the district court to the instruction that he now assigns as error. Therefore, we may review that instruction only if the district court was aware of Davidson's position on this issue and if an objection would have been useless.

The district court was clearly aware of Davidson's position on the question of his negligence. At the close of the evidence Davidson moved for a directed verdict on the issue of comparative negligence. The court denied that motion. Davidson made his position clear again when he objected to Drott's proposed jury instruction regarding comparative negligence. He specifically argued that no instruction should be given on comparative negligence because there was no evidence to support a jury finding that he had been negligent. The court rejected this objection.[1]

Later, in its instruction on causation, the court instructed the jury that it could find that Davidson's negligence was the sole cause of the accident. That instruction permitted the jury to conclude that Drott's design defect was not a cause of the injury because Davidson's negligence was the sole cause. There was no support in the record for such a finding.

---

[1] Davidson claims that it was error for the district court to deny his motion for a directed verdict on the issue of comparative negligence and for it to give a jury instruction on comparative negligence. Any error committed by the district court in this regard was harmless because the jury did not reach the issue of comparative negligence.

At the time it gave this instruction, the court was fully aware of Davidson's position on the issue of his own negligence. It would have been useless for Davidson to object to this jury instruction at the time it was given. The court had already rejected a motion and an objection based on the same reasoning. It had made clear that it did not agree that there was no evidence that Davidson had been negligent. Moreover, Davidson's failure to object under the circumstances here can be traced in part to the fact that the objectionable language regarding his negligence was not part of the printed instructions that had previously been approved. The approved instruction was on causation. The court sua sponte amplified on that instruction orally and in doing so introduced the issue of Davidson's negligence. All of these circumstances argue that appellate review is appropriate.

We next consider whether the jury instruction as given was more probably harmless than not. *See Haddad,* 720 F.2d at 1459. We conclude that it was not.

Given the manner in which the first question on the special verdict form was phrased, it is impossible for us to determine what the jury based its decision on. The first question on the form asked the jury to decide essentially two questions. First, was there a design defect? Second, if there was a defect, did that defect cause the injury? We have no way of knowing which of these questions the jury answered when it answered "no" to question number one. Further, if the jury intended to answer the second question, we have no way of knowing whether it answered "no" because it found, in reliance on the oral explanation of the causation instruction, that Davidson's negligence, rather than the defect, was the sole cause of the injury. This confusion would have been avoided if the district court had clearly separated the issues of a design defect and of causation on the special verdict form.

The issue of Davidson's negligence was clearly presented to the jury in the district court. At oral argument in this court, Drott indicated that it had two defenses at trial: (1) that there was no design defect and (2) that Davidson was comparatively negligent. We are satisfied that Davidson's negligence was made an issue at trial and was emphasised by Drott.

For the forgoing reasons we find that the instruction as given by the district court was not harmless. We therefore REVERSE and REMAND for a new trial not inconsistent with this opinion.

In light of our disposition of this case, Davidson's appeal was clearly not frivolous. Drott's request for attorney's fees is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3537
CV-81-399-RCB

DAN DAVIDSON and PEGGY DAVIDSON,
Plaintiffs-Appellants,

vs.

DROTT MANUFACTURING CORPORATION,
Defendant-Appellee.

FILED
Jan. 28, 1986

APPEAL from the United States District Court for the ANCHORAGE District of ALASKA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ANCHORAGE District of ALASKA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED and REMANDED. Drott's request for attorney's fees is DENIED.

cy, L. Ames Luce
William D. Artus
David Thorsness
Judge Belloni

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-3537
DC No. CV 81-399 RCB

DAN DAVIDSON and PEGGY DAVIDSON,
Plaintiffs-Appellants,

v.

DROTT MANUFACTURING CORPORATION,
Defendant-Appellee.

FILED
APR 18 1986

ORDER

Before: WRIGHT, CANBY and WIGGINS, Circuit Judges

Appellee's petition for rehearing is denied.

APPENDIX D

Rohrbraugh—Direct

August of 1979?

A Yes.

Q And sir, could you tell us what you were doing there?

A I was employed for ACI as a pile driver, rigger.

Q Some of the jury may not know what a pile driver rigger is, sir, could you tell us?

A Well, we build docks, bridges, wharfs, we drive piling which can consist of concrete, metal, wood, jobs as a rigger.

Q Are you frequently around, and have materials moved by cranes?

A Yes.

Q And are you required to rig cranes?

A Yes.

Q Now, you've got another trade, you indicated, what's that?

A Sheet metal.

Q All right. Tell us what you do with that trade?

A Well, it's ventilation, heating, air conditioning.

Q In that trade, sir, are you required to be around various types of cranes?

A Yes.

Q And do you do rigging as a—

A Yes, I do.

Q Sir, in your experience, is it normal practice in your trade to work under an unloaded hook—

* * *

MR. PETERSON: I'd like permission to approach the witness with a copy of his deposition at this time.

THE COURT: All right.
(Peterson approaches witness.)

BY MR. PETERSON:

Q Sir, I'd like to refer you, please, to page 50 of your deposition, regarding a general discussion about standing underneath the hook and the load. I'd like to put to you the question, and I'd like for you to read to the jury your answer that you gave at the time of the deposition.

A You want me to read this?

Q I'll ask you the question that was asked in the deposition, and I would like you to read to the jury the answer that you gave at that time. Let me start here:

> "Question: Let me clarify the situation. I'm talking about if you're preparing the sling, and are lowering the hooks to hook up," and what was your answer?

A "You don't get under it, no."

"Question: And that is a fact of common safety?"
A "Yes."

Q Thank you.

MR. PETERSON: At this time, Your Honor, I'd like to inquire regarding the safety meeting notes.

THE COURT: Go ahead.
BY MR. PETERSON:

Q Sir, can you tell us what the practice was with ACI on Adak Island regarding safety meetings?

MR. LUCE: Objection, it's not relevant.

MR. PETERSON: I would argue that it is relevant, Your Honor, specifically with respect to the comparative negligence claim. The matter of standing underneath the cranes and hooks was, in fact, the subject of the safety meetings, and this witness was in attendance along with Mr. Davidson.

MR. LUCE: Your Honor, that's a representation that I believe is inaccurate, but if he can establish that testimony—

THE COURT: The objection is overruled.
BY MR. PETERSON:

Q It's correct, is it not, sir, that there was a safety meeting every Monday, out on Adak?

A Monday, yes, say Monday, once a week, whatever the day.

Q And what was the general procedure of that meeting?

A Just safety, be safety conscious on a job, if you've seen something that was not safe, you would either report it to your foreman, or take care of it yourself, and then report it.

Q And was there an agenda of items, safety items, that was written out at each meeting?

A Usually.

Q And were you required to sign a sign-up sheet if you were attending that meeting?

A Yes.

Q I would like to have the witness examine please, Exhibit 11. Sir, can you examine that document and tell us whether you find your signature anywhere within that document?

A (Witness examines document.) Yes.

Q And where does your signature appear?

A On the first page of—the signature is on line—on the 12th line.

Q And you were required to sign up on that sheet at the time of the safety meeting, is that correct?

A As much as I can recollect, yes.

MR. PETERSON: I'd like to offer this in evidence at this time, Your Honor.

MR. LUCE: Your Honor, unless Mr. Peterson can establish that what he said is correct, there's nothing in this safety meeting that I can find, do you find anything Mr. Peterson, that shows anything about not working under a hook?

BY MR. PETERSON:

Q Sir, I'd like you to please refer to the second page of the safety meeting—first of all, what is the date reflected within that document?

A 7-30-79.

Q Was it the practice to discuss the items which appeared on the agenda?

A Yes.

Q Would you please look at page 2 of that document, the fourth item which appears there.

A Which item, sir?

Q The fourth item down on the second page.

A It says, "keep work area clear."

Q The next one beyond that please.

A What page are you on?

Q The second page of the document, down, the fourth item on there, after it says the heading, "safety meeting."

A Let me see, I'm going—the first one is—

Q Where it says "make all men. . .," do you see that, sir?

A Make all men aware? All right, now which one do you want me to read?

Q That one that you just referred to.

A "Make all men aware when pouring concrete and moving crane over the heads of men."

Q That was actually discussed as a safety item just in the week prior to Mr. Davidson's accident, was it not?

A Yes.

* * *

question.

MR. PETERSON: That's all the questions I have, thank you.

THE COURT: So, call the next.

MR. LUCE: Your Honor, was that exhibit admitted into evidence?

THE COURT: It was.

(Defendant Exhibit No. 11 was thereupon admitted in evidence.)

MR. LUCE: At this time, Your Honor, we are going to call Peter Esser. He will be by television deposition. Mr. Esser is the president—or American representative and president of Krueger Crane Systems. His deposition was taken at the Watch Tower Inn (sic) in Illinois.

THE COURT: All right.

VIDEOTAPE DEPOSITION OF PETER ESSER

"MR. LUCE: This is the time that has been scheduled for the deposition of Peter Esser in the case of Davidson V. Drott. My name is L. Ames Luce. I am plaintiffs' attorney representing the Davidsons.

"Matt Peterson is here on behalf of Drott. Mr. Peter Esser is here pursuant to federal subpoena which has a duces tecum requiring him to bring certain materials and objects to the deposition. This deposition is being

* * *

APPENDIX E

Radtke—Cross

Q But nevertheless, they are experienced operators on these large construction cranes?

A Yes.

Q And those operators understand that you should not two-block a crane?

A Yes.

Q In fact, it's a matter of pride among the operators, isn't it, not to two-block a crane?

A Well, it's awfully embarrassing, for one thing.

Q And it's a matter of concern to the people down on the ground working around the crane, isn't it?

A Definitely.

Q Sir, regarding knowledge of two-blocking, have you seen warnings in cabs regarding lowering the line while extending the boom?

A Most of them will have a warning up there that you have to—when you extend the boom, you've got to let your load down at the same time.

Q All right. But in your case, and with the other experienced operators, you already know that you should not two-block.

A Yes.

Q And do you recall in your deposition you testified that the warning would not make any difference since you already

* * *

APPENDIX F

Lassiter—Direct

A Yes, I have.

Q Could you tell us approximately how many hours, approximately, of hydraulic crane operation you have?

A Oh, somewhere between 5 and 10,000 hours.

Q Sir, were you at Adak, Alaska during August of 1979?

A Yes.

Q Would you tell the members of the jury why you were there?

A We were rebuilding a dock, and building a new dock.

Q And you were there as a member of the Operating Engineers?

A Yes.

Q And what specific job did you have, sir?

A I was operating a crane.

Q And could you tell us what type?

A Well, there were two types there, one was a 20 ton Lorain, and one was a 25 ton Drott.

Q And sir, during the time that you were there, did—were you involved in an incident with the Drott crane?

A Yes, I was.

Q And could you, to the best of your recollection, I realize it's been a while, could you go back for us, and in your mind's eye, could you relate for us what occurred?

A I two-blocked the whip line, which is the light load line, I two-blocked that with the boom, and the ball came off the line and fell into the ocean.

Q What were you doing just before that time with the crane?

A I was working over the edge of the dock, picking up a work platform that men worked on, and that I couldn't see, and picking it up so that it would come over and rest on the dock.

Q Now, at the time you indicated you two-blocked the crane what, if any activity, were you doing at the time?

A I was extending the boom.

Q Now, as you were extending the boom, what occurred?

A Well, the boom was going out, and the line came in with the headache ball, and the ball came off the line and fell into the ocean.

Q Now, did you have a chance to examine the whip line after that incident occurred?

A Yes.

Q And could you tell us, sir, had it broken, or had it pulled out of a defective clamp?

A Pulled out of a defective clamp.

Q Was that crane re-rigged and used—

A Yes, it was.

Q —after that?

A Yes, it was.

Q Sir, have you, during your experience, ever used a

* * *

APPENDIX G

Davidson—Cross

A I've been called out as a welder to weld up the rollers on a crusher.

Q So you have welding skills, don't you?

A I have welding skills I picked up on my own, yes, I do.

Q All right. What else have you been called out to do?

A As a mechanic, welder, as a concrete pump operator.

Q Anything else?

A Yes, as a dozer operator.

Q Anything else?

A As a crane—not as a crane operator, but I have operated a crane.

Q You have operated a crane, haven't you.

A Yes, sir, oh, yes.

Q And you've operated hydraulic cranes?

A Oh, yes.

THE COURT: There will be a recess now for 10 minutes.

(Court recessed at 2:58 p.m. until 3:12 p.m.)

THE COURT: Continue.
BY MR. PETERSON:

Q Mr. Davidson, you have been a crane operator for the operating engineers?

A Yes.

Q And you've operated hydraulic cranes, haven't you?

A Yes, sir.

Q You're aware of the potential for two-blocking, aren't you?

A Yes, sir.

Q And you're also aware as an operator that you have the responsibility to avoid that condition, don't you?

A Yes, sir.

Q Now, on this particular job with ACI out on Adak, what exactly was your job out there?

A My job was concrete pump operator, which they only ran about two to three days a week.

Q And so did you only work two to three days a week?

A No, I was running cranes the rest of the time.

Q Oh, you were running cranes out there.

A Yes, sir.

Q All right. Let's talk about the concrete pump just for a moment. Can you describe for the jury what it looks like?

A A concrete pump is approximately five or six feet high, it's about—approximately 10, 12 feet long. It has a—what you call a hopper on it with a mixer inside that hopper. The guy batches the cement over here, the concrete pump is set up next to the batch plant where when this guy gets through mixing the cement, he pushes another large button, and this bug drum, just like the ones you see on the cement trucks running around town, and then the

* * *

Q What's the date at the top of that page?

A July the 30th, '79.

Q And what appears on that page, generally?

A Names of workers.

Q Do you see your signature on that page?

A I see mine—not on the first page, I don't.

Q Take a look, about the fifth one up from the bottom.

A On the third page?

Q Right, the first page of signatures, third page of the document.

A Okay, I see it now, boy there's a lot of chicken scratching there.

Q That's your signature, isn't it, there?

A Yes, sir.

Q And there's other signatures such as George Barnett, Ole Rohrbraugh, and other people that you worked with?

A Yes, sir, they are.

Q Is that a sign-up sheet for a safety meeting that was held?

A Yes, sir.

Q And July 30, of '79, that was just within the same week before your accident, wasn't it?

A I believe that was the morning of my accident.

Q Okay. Your accident was August 6th, 1979?

A I'm sorry. It wasn't the morning of the accident. It was August the 6th, my accident was.

Q All right. You were present at that meeting, weren't you?

A Yes, sir.

Q And do the first two pages represent kind of a list or agenda of items to talk about?

A The first two pages?

Q Right.

A Yes, sir.

Q Now, taking a look at the first page where it says 7-30-79, safety notes, do you see the second item there where it says watch out for concrete hoses while pumping?

A Yes, sir.

Q Is that something that you raised as a concern at the meeting?

A Watch out for concrete hoses while pumping?

Q Right.

A That would have been the people on the dock to watch out, because they used the crane on the dock to swing the hose around to dump the concrete in the forms.

Q All right. So that was discussed at that meeting about watching out when there was moving machinery around the concrete?

A No, sir, the hose was buried under the road.

Q But there was a discussion about watching out when the crane was moving.

A Oh, yes, sir, there was a discussion, talking about out on the dock.

Q Now, you were running the concrete pump at that time?

A Yes, sir.

Q And concrete hose really is a part of your equipment, is it not?

A No, sir, that is a laborer's department.

Q All right. Would you refer please to the second page where it says safety meeting, 7-30-79.

A Yes, sir.

Q Do you see where it says, "make all men aware when pumping concrete and booming crane over the heads of men."

A That's correct.

Q That was something that was discussed at that meeting, was it not?

A Correct.

Q How was the concrete pump set up? I guess maybe I would like you to describe how it was sitting, and what equipment was around it at the time of your accident.

A If I remember correctly, the batch plant was setting there. You had equipment moving around all over the place. About 200 foot, possibly, or farther, they had a crane set up with a—that would pick up the hose and guide it around for the guys.

* * *

A Yes, sir, I got there 7:00 o'clock, approximately. Well, when the bus got up there, it was probably about five minutes to 7:00.

Q And you figured this might probably take a while, or a day or so to fix this thing?

A We figured—I got the—we sort of figured it would take a day, a day and a half, if we had to order parts, it would be a week.

Q So there was really no immediate rush to get that thing moved out of the way.

A Oh, no, sir.

Q Mr. Branin was operating the Drott 2500 on the day of the accident?

A I didn't know Mr. Branin's name at the time, I do now.

Q Where had the Drott 2500 been stored?

A The first time that morning when I saw the Drott 2500, it was—would have been on my left if I were facing the road out in front. Say this is the pump facing the road here, I would have been standing here, and if I had turned around, he would have been directly on my left.

Q The crane was typically stored in some specific area after each shift, wasn't it?

A It was parked, when the night shift left it, as far as I know.

Q And the operator had to bring the crane from where it was parked, over to where the pump was.

A Well, if I remember correctly, they were a ditch—they had dug a ditch across the road for some reason, I think it was electrical, or something, they had to bury electrical cables, or something. The ditch was left open and hadn't been filled in. The crane pulled up, come in from my left at the time. George Barnett talked to the crane operator that we—where we was going to set the pump. The crane would not have been able to reach the position, or where we were going to set it.

So the crane couldn't come across the ditch, it was too deep and wide, so George was not watching him point, pointed to the crane to go around that building, and come on this side of the ditch.

Q Was the crane going to lift the concrete pump, then move it, and set it over while the crane stayed stationary in the same position?

A He was going to set up back here alongside the batch plant, the best I can remember, and put out his outriggers, swing over and pick up the pump, swing the pump from here approximately to the right rear of the equipment, the crane.

Q You were aware when the crane came up and then stopped next to the pump?

A I saw the crane come up and stop.

Q And you were about six feet high off the ground at that time?

A I wouldn't swear I was six feet, five feet. It was up off the ground over five feet.

Q And does the operator in that crane sit up about the same level?

A I would say yes, he would be approximately the same level as me.

Q And so the boom is at that level or somewhat higher than that, isn't it?

A Yes, sir, um-hmm.

Q You were aware that the boom swung over towards the pump, weren't you?

A No, sir, I never saw the boom swing over to the pump.

Q That wasn't my question, sir, you were aware of it swinging over.

A Oh, I was aware of it, that he was eventually going to wing over and pick it up, yes, sir.

MR. PETERSON: Counsel, I'd like to have the witness shown a copy of his deposition, number one, if we could.

MR. LUCE: Are you talking to me?

MR. PETERSON: Yes, do you have a copy of that?

MR. LUCE: I'm going to be using ours. If the court has a copy, maybe you could show him yours.

MR. PETERSON: I can just show him mine, if that's—if I might approach the witness, Your Honor.

THE COURT: Yes.

BY MR. PETERSON:

Q All right, Mr. Davidson, you recall I took your deposition about a year and a half ago in this case?

A It's been quite a while.

Q And you were under oath at that time, weren't you?

A And we discussed in detail the day of the accident, and a number of other things, didn't we?

A I'm sure we did.

Q All right. I'm going to show you the—I'm just going to read my questions and your answers at the time of the deposition, starting at page 95, line—well, let's start at line 18 for a little background.

"Question: Were you actually all the way on top of the concrete pump at the moment the crane stopped?

"Answer: Yes.

"Question: Did the boom of the crane move at any time after the crane came to a stop by the concrete pump?

"Answer: Yes.

"Question: Okay. Which direction did it move?

Your answer was: "He had swung it to his left.

My question: "To his left, towards the concrete pump?

"Answer: Yes."

Referring now to page—

MR. LUCE: Your Honor, I don't want to interject, but the next question is, did you actually see him swing to the left, and the answer is no, and that is deceitful as far as him relating the information to the jury.

MR. PETERSON: Well, I resent that comment, Your Honor, and I think we can clear it up with this next series of questions, and certainly, counsel has the perfect right to ask any clarification questions that he would like.

THE COURT: Well, what are you reading the deposition for?

MR PETERSON: This gentleman just testified that he was not aware that the boom swung over, and the testimony is different from that in the deposition.

THE COURT: Well, I haven't heard any difference yet, have you.

MR. PETERSON: I have it right here, Your Honor, if I would have been permitted to continue, I have about one more question, one or two more questions.

THE COURT: All right, go ahead.

MR. PETERSON: All right.

MR. LUCE: Your Honor, I was wondering if we might have the witness to have an opportunity to look at that, and then have the question asked, is his testimony different so that the witness has an opportunity to not have selective editing by counsel, so that he can have a fair chance to answer the question.

THE COURT: No, that's not the procedure we'll follow. The procedure is okay, except that you're supposed to be showing something that is inconsistent to what he's already testified to, and I haven't heard anything.

MR. PETERSON: If I may continue, Your Honor?

THE COURT: Well, providing you can find something inconsistent in there. If you can't, well then there's no point in it.

BY MR. PETERSON:

Q Page 101:

"Question: Okay, what did you think was in your own mind what—

Your Answer: "He was swinging over to pick it up.

"Question: Okay. And did you know that, even though you weren't actually looking?

"Answer: Yes."

Mr. Davidson, now referring to the period of time after your accident. You saw Dr. Smith?
A Yes, sir, I did.

Q You also saw Dr. Lindahl, is that correct?

* * *

APPENDIX H

rather, or it could even find that one of those things was the sole cause. It could not find that it was a superceding or intervening cause. Therefore, the following instruction should solve the problem and express the law as it is currently in Alaska.

If the accident was caused solely because of the substitution of the chain for the ball, that is the same as to say that the design did not cause the accident and your answer to question number one would be no.

The same would be true if the operator's negligence was the sole cause, or the plaintiff's own negligence was the sole cause.

A different rule applies if the defective design was a part of the cause and one of those other events were also a part of the cause.

And I'll explain those factors in more detail later in the instructions.

The one motion that's been made, I have no leanings either way. I have a great deal of doubt both ways. That's the comparative negligence issue. So, because I'm going to ask Mr. Luce to speak first doesn't mean that I am leaning one way or another, it's just simply his motion and I want to hear from both sides on this one.

MR. LUCE: Your Honor, in this motion, we must realize that the defendant would have the burden of proof,

* * *

THE COURT: Go ahead.

MR. LUCE: And very briefly.

If you suppose that what Mr. Peterson says is correct, that anybody who has ever done this, then Mr. Davidson would have got up on this pump, and irrespective of whether he saw the man swing the crane boom over, which

he says he did not, he would be negligent in staying there. So, he had to keep his eye on the boom at all times to see if it was going to swing over. If it did, he had to leap off the pump. Then he would have to have the operator move the boom back away from the pump. Then he would have to have the rigging attached. Then he would get off the pump. The person would swing the boom over, drop the line or the block down. Now, he would get back up on the pump and he would start to attach the chokers. If the person hadn't lowered the block far enough or lowered it too far, then he'd get back off the pump. The operator again would move the block until he got it just right. Then the person would put the chokers on. Then he would move off the pump and the person would start to make the pick.

And all of this time, Your Honor, you've got to realize Mr. Davidson is required to work underneath that boom. He has got to work underneath that boom of that crane to do his job.

THE COURT: Okay. I think of the five motions, this is the only difficult one, and comparative negligence is almost always a jury question and it is here.

This is one I might take another look at if comparative negligence is actually found, because of my strong feeling that—well, I sure wouldn't have stood under that thing. I mean, I feel so strongly about that, I wonder why anybody else does stand under one of those descending loads from a crane. But—well, I can think of a dozen things that could happen to get that thing on his head and a broken boom isn't one of them either.

All right. So you know what the verdict form is going to be like and you now have the copy of the instructions before you. You can spend a few minutes with them and be ready to start your arguments in about 20 or 30 minutes, and this will let you know what the Court is going to tell the jury.

I'll be in recess while you're studying that.

MR. LUCE: Your Honor, we'd be ready to go in about three minutes, if you're—

THE COURT: Okay, you argue first.

MR. THORSNESS: If the Court please, are you going to limit argument at all or just?

THE COURT: Oh,—

MR. THORSNESS: It's now 2:30, or 2:20 rather.

THE COURT: Without committing yourself exactly,

* * *

plaintiff seeks to recover.

In order for the defendant to avoid paying plaintiffs damages, it must prove that on balance, the benefits of the challenged design outweigh the dangers inherent in the design.

If, and only if you find the injury was caused by a defective design, we will then award the plaintiff, Dan Davidson, a sum which will compensate him for his loss. If you find Dan Davidson is entitled to damages, you will decide whether the plaintiff, Peggy Davidson, is entitled to an award of damages for loss of consortium, and fix that figure, if any.

You will then go to the question of whether the plaintiff, Dan Davidson, was himself negligent in a manner which caused or contributed to his own injuries, and arrive at the percentage of his negligence, if any. If you find that he was negligent, then the award to Dan Davidson and Peggy Davidson will each be reduced by the amount of that negligence.

You will be given this special verdict form that I have been talking to you about, this three page document. I will now go through it with you and explain the law that you are to apply to each question.

The first question asks, "Did the plaintiff, Dan Davidson, prove that the crane's design caused his injury?" You'll answer yes or no. A legal cause of damage is a cause which is more likely than not a substantial factor in bringing about plaintiff's injuries. A defect in a product is a substantial factor when it is shown both that the accident would not have happened but for the defect, and the defect was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to the defect.

This does not mean that the law recognizes only one legal cause of an injury or a damage, consisting of only one factor, or thing, or conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons may operate at the same time, either independently, or together to cause injury or damage, and in such a case, each may be a legal cause.

Manufacturers are not absolute insurers of their products, the law will not impose legal responsibility simply because a product causes harm. If the accident was caused solely because of the substitution of the chain for the ball, that is the same as to say that the design did not cause the accident, and your answer to question number one would be no.

The same would be true if the operator's negligence was the sole cause, or if the plaintiff's own negligence was the sole cause. A different rule applies if the defective design was a part of the cause, and one of these other events were also a part of the cause. In that case, each would be a legal cause.

The plaintiff alleges that the crane involved in the accident was defectively designed because it was not equipped with a two-blocking protective system. That is the only kind of defect that is under consideration when you answer question number one.

I will repeat that question, "Did the plaintiff, Dan Davidson, prove that the crane's design legally caused his injury?" Yes or no. In other words, was it a legal cause. If you answer question number one no, then you are finished, and your presiding juror will sign the verdict form.

If you answer question number one yes, then proceed to question number two, which asks, and these directions are right on the verdict form itself, "Did the defendant prove on balance the benefits of the challenged design outweigh the dangers inherent in such design?" Answer, yes or no.

Even if the plaintiffs have met their burden of proof on the first question, defendant Drott may avoid liability if by a preponderance of the evidence it can establish that the benefits of the challenged design feature of the hydraulic crane, as existed at the time of the

* * *

AFTERNOON SESSION

(Call to Order of the the Court, Jury In at 2:00 p.m.)

THE COURT: Has the jury reached its verdict?

THE JURY: We have, Your Honor.

THE COURT: May I have it please? The Clerk will read the two verdicts that I've handed her.

THE CLERK: We the jury find as follows: Question one: Did the plaintiff, Dan Davidson, prove that the crane's design legally caused his injury? Answer: No. Dated October 3rd, 1984, Clifford Hughes, Juror.

In Case No. A-81-399, Peggy J. Davidson versus Drott Manufacturing, we the jury find for the Defendant. Dated October 3rd, 1984, Clifford Hughes, Presiding Juror.

THE COURT: Ladies and gentlemen, we follow the process in this court of verifying the jury, verifying that it is a unanimous verdict. We call this polling the jury.

Each person is asked whether this is your verdict, and your answer should be yes or no. Poll the jury please?

THE CLERK: Arnold Garganta, is this your verdict?

MR. GARGANTA: Yes.

THE CLERK: Margarita Green, is this your verdict?

MS. GREEN: Yes.

THE CLERK: Ms. Nelson, is this your verdict?

MS. NELSON: Yes.

THE CLERK: Ms. Collins, is this your verdict?

APPENDIX I

1984		
Sep 25	117	Fld CRT MINS re 1st day jury trial.
26	118	Fld CRT MINS re 2nd day jury trial.
27	119	Fld CRT MINS re 3rd day jury trial.
28	120	Fld CRT MINS re 4th day jury trial (9/28/84); deft mot for directed verdict DENIED. Case cont to 10/1/84, 9:00am.
Oct 01	121	Fld CRT MINS re 5th day jury trial. Case cont to 10/2/84, 9:00am.
1	122	Fld pltf objec to testimony of W. Berger (filed in crt).
1	123	Fld pltf obj to deft proposed instructions to jury (fld in crt).
1	124	Fld deft list of testimony to be offered (fld in crt).
1	125	Fld deft objec to pltf jury instructions (fld in crt).
2	126	Fld CRT MINS re 6th day jury trial; deft mot for directed verdict or alt mot for dsmsl denied; deft mot to dsms punitive dmgs granted; pltf mot for dir verdict & mot to dsms comp negligence denied; case cont to 10/3/84, 9:00am.
3	127	Fld CRT MINS re 7th day jury trial; jury instructed—verdict in favor of deft & against pltf.
4	128	Fld jury verdict for the defts.
4	129	Fld special verdict.
4	130	Fld JUDGMENT in favor of defts & against pltf. cy cnsl, O&J 2301.

4	131	Fld pltf mot for judgment notwithstanding verdict as to issue of causation or for new trial on all remning issues or all issues w/memo.
4	132	Fld pltf notice of intent to file objec to jury instructions gvn by crt.
10	133	Fld deft oppo to pltf mot for jdgmnt nov or in alter for a new trial
10	134	Fld deft oppo to pltf notice of intent to fle spec objec to jry instructs as were gvn by crt.
15	135	Fld deft mot for atty fees w/memo, aff & exhbs. (cy to Judge B)
15	136	Fld Bill of Costs re hring 10/22/84, 9:00am, w/memo & exhbs.

APPENDIX J

Seventh Amendment to the Constitution of the United States of America:

> Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

APPENDIX K

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Drott Manufacturing Company

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-3537
DC No. CV 81-399 RCB

DAN DAVIDSON and PEGGY DAVIDSON,
Plaintiffs-Appellants,

VS.

DROTT MANUFACTURING CORPORATION,
Defendant-Appellee.

PETITION FOR REHEARING

Drott Manufacturing Corporation, by and through its attorneys, Hughes, Thorsness, Gantz, Powell & Brundin, pursuant to Federal Rule of Appellate Procedure 40, hereby files its Petition for Rehearing of the appeal from the United States District Court for the District of Alaska of the above case by plaintiffs. Drott petitions for rehearing of the court's order filed January 28, 1986.

In reversing the jury verdict in favor of Drott, the Appellate court has overlooked or misapprehended several factual and legal issues. The court's finding should be vacated and reheard for the following reasons.

I. The court erroneously believed the the jury instruction in which comparative negligence was mentioned in the context of causation was given sua sponte by the trial court judge, thus allowing plaintiffs' attorney no time to object properly. In fact, the instruction was not given sua sponte. Therefore, plaintiffs' failure to object is fatal to his appeal on the issue.

II. Without an objection to the instruction by the plaintiffs, the instruction would have to constitute "plain error" in order for the court to review it. The matter did not constitute plain error.

III. Any error was harmless in viewing the case and the instructions as a whole.

IV. There was substantial evidence of negligence, which the court has mistakenly overlooked or misapprehended sufficient to permit the question of comparative negligence to go to the jury in the litigation.

Federal Rule of Appellate Procedure 40 provides:

> (a) Time for Filing; Contents; Answer; Action by Court if Granted. A Petition for Rehearing may be filed within fourteen (14) days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which is in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the position of the petitioner or as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a Petition for Rehearing will be received unless requested by the court, but a Petition for Rehearing will ordinarily not be granted in the absence of such a request. If the Petition for Rehearing is granted the court may make a final disposition of the

> cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

This Petition for Rehearing is timely under Appellate Rules 26(c) and 40.

I.

The court notes at Page 3 of its Opinion of January 28, 1986 that "Davidson did not object in the District Court to the instruction that he now assigns as error." In addition, the court indicates that it would ordinarily review a District Court's jury instruction only if there is specific objection in the District Court to the instruction as given.

The court mistakenly, however, believed that Davidson's failure to object was due to the District Court judge spontaneously adding the instruction orally at the time of instructing the jury. Indeed, this court stated as Page 4 of its Opinion:

> Moreover, Davidson's failure to object under the circumstances here can be traced in part to the fact that the objectionable language regarding his negligence was not part of the printed instructions that had previously been approved. The approved instruction was on causation. The *court sua sponte amplified on that instruction orally* and in doing so introduced the issue of Davidson's negligence. All of these circumstances argue that appellate review is appropriate.

(Memorandum Opinion, Page 4).

The court's understanding of the facts is incorrect. The record indicates, rather, that such an instruction was not simply adlibbed by the trial court judge during final instructions. The jury was instructed on October 3, 1984.

The matter of instructions in general had been a subject of continuing discussions between the court and the parties throughout the proceeding. There was a lengthy discussion of instruction on October 2, 1984, the day before final instructions in court to the jury. In discussing the causation instruction of which plaintiffs now complain, the trial court stated:

> Therefore, the following instruction should solve the problem and express the law as it currently is in Alaska.
>
> If the accident was caused solely because of the substitution of the chain for the ball, that is the same as to say that the design caused the accident, and your answer to Question No. 1 would be No.
>
> The same would be true if the operator's negligence was the sole cause, or the plaintiff's own negligence was the sole cause.
>
> A different rule applies if the defective design was a part of the cause and one of those other events was also a part of the cause.

Transcript, 6-132, Line 20 through 6-133, Line 15.

The instruction stated by the court on October 2, 1984 at TR 6-132 is verbatim of the instruction which was actually given on October 3, 1984 in TR 7-10, Lines 18-25 through 7-11, Lines 1 and 2. No objection was made by plaintiff.

The Appellate Court apparently believed, in its review of the matter, that the plaintiff was somehow surprised by a sua sponte oral amplification of the jury instruction which occurred during the giving of the instructions to the jury. This is incorrect. Accordingly, the court should not even reach the question because of plaintiffs' clear failure to object.

The requirement that a party object is not a mere technicality or a formality. Rather, the purpose is to allow the trial court to reconsider its decision at the time, and perhaps to correct that decision. *Clary Insurance Agency v. Doyle,* 620 P.2d 194 (Alaska 1980). The mere fact that the court is generally aware of plaintiffs' position on the issue does not excuse the failure to object. *Ollice v. Alyeska Pipeline Service Co.,* 659 P.2d 1182 (Alaska 1983).

In this case, it is by no means certain that the court would have rejected out of hand plaintiff's objection. This is true since (1) the court had declined to instruct on Drott's requested instructions on superseding and intervening cause and (2) even in the context of the directed verdict motion on comparative negligence, the court considered it to be a close question. However, the judge was never given the chance to consider the question. The alleged defect in the instruction of which plaintiff now claimed was not raised or brought to the attention of the court either on October 2, 1984 when it was discussed, nor on October 3, 1984. Objection is required before the Appellate Court may review the issue. Federal Rule of Civil Procedure 51. Further, to the extent that plaintiff now complains of the instruction, plaintiff may actually have invited the error of which he now complains. *See Deland v. Old Republic,* 758 F.2d 1331 (9th Cir. 1985).

II.

Absent an objection to the instruction, the court still may not review the trial court's instruction unless there was plain error. The plain error doctrine is not discussed in the court's Opinion. This is required and is a substantive requirement under Alaska law in the case such as *Haskins v. Sheldon,* 558 P.2d 47 (Alaska 1976); *Vest v. First National Bank of Fairbanks,* 659 P.2d 133 (Rehearing 670 P.2d 707) (Alaska 1983). In order to have plain error, there must be a "high likelihood" of the jury following the wrong theory, resulting in a miscarriage of justice before the

court will apply the plain error rule. *City of Nome v. Ailak,* 570 P.2d 162 (Alaska 1977); *Brown v. Jonz Estate,* 591 P.2d 532 (Alaska 1979); *Ollice v. Alyeska Pipeline Service Co.,* 659 P.2d 1182 (Alaska 1983). Here, the court has found that a reasonable jury would not have found comparative negligence. Thus, under the court's own reasoning, there is not a high likelihood that the jury followed the wrong theory.

III.

To the extent that there may have been any error, the error obviously was harmless. The objecting party must show not only error, but substantial prejudice. *McCracken v. Davis,* 560 P.2d 771 (Alaska 1977). This cannot be decided by mechanistic formula, but the court must consider all of the circumstances surrounding the case and the alleged error. *Poulin v. Zartman,* 542 P.2d 251, Rehearing denied 548 P.2d 125 (Alaska 1975). Error is harmless if there was no reasonable possibility for juror confusion. *Wilson v. State,* 669 P.2d 1292 (Alaska 1983). A detailed discussion of the harmless error rule under Alaska law is found in the case of *Love v. State,* 457 P.2d 622 (Alaska 1969). Although the decision arises in the context of a criminal case, the reasoning is sound.

The court indicated that:

> The pivotal question is what the error might have meant to the jury. Our function is to consider not how the error would have affected us if we had tried the case, but how it may have affected a jury of reasonable laymen. It is the impact on their minds which is critical in determining whether an error impaired or affected the substantial interests of the defendant in having a fair trial.

457 P.2d at 630. The court's analysis further indicated what the review in court must itself do in weighing the issue of harmless error.

> Had the error pointed out not been committed is the reasonable probability that the verdict might have been different? In answering this question, the members of this court must necessarily put themselves, as nearly as possible, in the position of the jury in order to determine whether, as a reasonable man, the error committed probably affected their verdict.

Love v. State, 457 P.2d at 631, n. 15, citing *State v. Dutton,* 318 P.2d 667, 671 (Ariz. 1957).

Clearly, in this case, the Appellate Court has, in effect, already made such a determination. The court has held that there is no evidence in the record from which a reasonable jury could find that Davidson was negligent. The court has stated that it was impractical for him to perform his job in any other way. The court, in effect, has put itself in the position of the jury. It has concluded that there was no comparative negligence. Thus, the issue could not operate to the detriment of Davidson.

Clearly, the Court has itself indicated that either a comparative negligence question was not reached (Page 3, Footnote 1) or that if it was, the reasonable minds would not hold Davidson to be comparatively negligent in any event. Thus, as a logical and legal matter, the issue of comparative negligence, using the court's analysis, simply could not have had any impact on the determination of whether the crane was defective. Any error which the court perceives is thus harmless. This is particularly true when one considers the jury instruction on defect as a whole. (TR 7-9, Line 24 through 7-11, Line 14). The court clearly instructed the jury that:

> A legal cause of damage is a cause which is more likely than not a substantial factor in bringing about plaintiff's injuries. *A defect in a product is a substantial factor when it is shown both that the accident would not have happened but for the defect, and the defect was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to it.*
>
> . . . Many factors, or things, or the conduct of two or more persons may operate at the same time, either independently or together to cause injury or damage, and in such case, *each may be a legal cause.*

(TR 7-10-) (emphasis added).

> The court went on to state that:
>
> . . . If the defective design was a part of the cause, and one of these other events were also a part of the cause. In that case, *each would be a legal cause.*

(TR7-10, 7-11) (emphasis added).

Clearly, under the instructions read as a whole, there was no error.

IV.

There is substantial evidence in the record which the court overlooked which created a jury question on the issue of comparative negligence.

First was the testimony of Ole Rohrbaugh. Mr. Rohrbaugh was employed for ACI, Davidson's employer, as a pile driver and a rigger. (Transcript 2-135).

On cross-examination, the following testimony was elicited from Mr. Rohrbaugh:

> Q. Sir, I'd like to refer you, please, to Page 50 of your deposition, regarding a general discussion about standing underneath the hook and the load. I'd like to put to you the question, and I'd like for you to read to the jury your answer that you gave at the time of the deposition.
>
> * * *
>
> Q. Let me clarify the situation. I'm talking about if you're preparing the sling, and are lowering the hooks to hook up, "and what was your answer?"
>
> A. "You don't get under it, no."
>
> Q. And that is a fact of common safety?
>
> A. "Yes."

Transcript 2-142.

Harold Radtke, plaintiff's operating engineer crane expert, testified as follows:

> Q. In fact, it's a matter of pride among the operators, isn't it, not to two-block a crane?
>
> A. Well, it's awfully embarassing, for one thing.
>
> Q. And it's a matter of concern to the people down on the ground working around the crane, isn't it?
>
> A. Definitely.

Radtke Testimony, TR 3-35.

Significantly, the very crane involved in Davidson's accident had been two-blocked several days before his accident. The operator testified, "I two-blocked the whip line, which is the light load line, I two-blocked that with the boom, and the ball came off the line and fell into the ocean." (Lasseter Testimony, TR 2-131, 132). Further, at the job in which Mr. Davidson was working, at Adak,

Alaska, there was a safety meeting once every week. (Rohrbaugh Testimony, TR 2-143). The minutes of the safety meeting were received in evidence as Exhibit "11". (TR 2-147). Mr. Rohrbaugh testified that the second page of the document, which was dated 7-30-79, six days before Davidson's accident, included reference to safety while working around cranes:

> Q. Sir, I'd like you to please refer to the second page of the safety meeting-first of all, what is the date reflected within that document?
>
> A. 7-30-79.
>
> Q. Was it the practice to discuss the items which appeared on the agenda?
>
> A. Yes.
>
> * * *
>
> A. Make all men aware when pouring comcrete and moving crane over the heads of men.
>
> Q. That was actually discussed as a safety item just in the week prior to Mr. Davidson's accident, was it no?
>
> A. Yes.

Rohrbaugh Testimony, TR 2-144, 145.
Davidson's own testimony showed both his knowledge of two-blocking and the need to be safe around cranes:

> A. Mr. Davidson, you have been a crane operator for the operating engineers?
>
> A. Yes.
>
> Q. And you've operated hydraulic cranes, havn't you?
>
> A. Yes, sir.
>
> Q. You're aware of the potential for two-blocking, aren't you?

A. Yes, sir.

(Davidson Testimony, TR 4-152, 153).

Davidson recognized his own signature on the safety minutes, Exhibit "11." (TR 4-155). He was present at the meeting where booming cranes over the heads of men was discussed. (TR 4-156, 157). (*Id.*). Further questioning went as follows:

Q. That was something that was discussed at that meeting, was it not?

A. Correct.

(TR 4-157).

On the morning of the accident, the plan was to move Davidson's concrete pump to another spot for repairs. There was no immediate rush to get the thing moved out of the way. (TR 4-160). The crane had to travel to Davidson's pump:

Q. You were aware when the crane came up and then stopped next to the pump?

A. I saw the crane come up and stop.

Q. And you were about six feet high off the ground at that time.

A. I wouldn't swear I was six, five feet. It was up off the ground over five feet.

Q. And does the operator in that crane sit up about the same level?

A. I would say yes, he would be approximately the same level as me.

Q. And so the boom is at that level or somewhat higher than that, isn't it?

A. Yes, sir, um hmm.

Q. You were aware that the boom swung over towards the pump, weren't you?

A. No, sir, I never saw the boom swing over to the pump.

Q. That wasn't my question, sir, you were aware of it swinging over.

A. Oh, I was aware of it, that he was eventually going to swing over and pick it up, yes, sir.

Davidson Testimony, TR 4-161, 162.

The testimony in Davidson's deposition taken prior to trial then became relevant to the trial proceedings:

Q. All right. I'm going to show you the-I'm just going to read my questions and your answers at the time of the deposition, starting at Page 95, Line-well, let's start at Line 18 for a little background.

Q. Were you actually all the way on top of the concrete pump the moment the crane stopped?

A. "Yes."

Q. Did the boom of the crane move at any time after the crane came to a stop by the concrete pump?

A. Yes.

Q. Ok. Which direction did it move? Your answer was: "He swung to his left. My question: "To his left, towards the concrete pump? Answer: Yes.

(TR 4-163, 164).

Q. Ok, what did you think was in your own mind what-your answer: "He was swinging over to pick it up.

Q. Ok. And did you know that, even though you weren't actually looking?

A. Yes.

(TR 4-165).

In brief summary, there was evidence that Davidson and the workers in general were aware of the potential for two-blocking, and it was "definitely" a concern to men on the ground. Drott will not restate the arguments made at Pages 18 through 22 regarding the legal standards under which comparative negligence is a jury question. The above testimony is specifically provided for reference to the court under the belief that the court simply overlooked or misapprehended the substance of the testimony which bore in the comparative negligence question. The court has erroneously substituted its judgment for that of both the trial court and the jury, which were both in a position to see the demeanor of the witnesses.

CONCLUSION

The court, in reviewing the jury verdict in favor of Drott Manufacturing in the above case has overlooked or misapprehended both legal and factual matters. The court should thus rehear the case based on a full consideration of all factors. The court, indeed, may not examine the error raised by plaintiff because it was not a sua sponte instruction given by the court. It was specifically discussed the day before jury instructions were given. No exception was made.

There was no plain error. Because of the court's own perception of the evidence, it is logically impossible that there was a high likelihood that the jury would have come to a different conclusion or would have followed the erroneous theory. Therefore, the was not plain error.

For the same reasons, any error was obviously harmless.

Finally, and perhaps most importantly, there was substantial evidence in the record on which there could be rational disagreement as to the comparative negligence or fault of Mr. Davidson.

For these reasons, and in viewing the record as a whole, the court's memorandum decision dated January 28, 1986, is mistaken. A new trial should not be required. Drott respectfully requests rehearing, that the order of January 28, 1986 be vacated, and that the result below be affirmed.

Dated this 14th day of February, 1986, at Anchorage, Alaska.

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By:/s/sMatthew K. Peterson
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